Zakaria bin Abdullah & Ors v Lembaga Perlesenan Tenaga Atom & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01-IM-234–05 OF 2012
RAMLY ALI, ABDUL WAHAB PATAIL AND ANANTHAM KASINATHER JJCA
12 APRIL 2013

Administrative Law — Judicial review — Application for — Decision to grant third respondent temporary operating licence to construct advanced materials plant — Whether decision was illegal and in breach of guidelines — Whether internal appeal procedure ought to be exhausted before appellants resorted to judicial review — Whether issues involved were highly technical and scientific in nature and better dealt with by forum other than ordinary court of law — Environmental Quality Act s 34A

The Atomic Energy Licensing Board ('the first respondent') had granted Lynas Malaysia Sdn Bhd ('the third respondent') a temporary operating licence ('TOL') to construct the Lynas advanced materials plant ('LAMP') in a town in Pahang. The LAMP was located between 2km to 20km from the appellants' homes. It was not disputed that the operation of the LAMP involved the use of radioactive materials and that it would generate radioactive waste. The appellants applied for a judicial review of the first respondent's decision approving the TOL on the grounds that the latter's decision was in breach of s 34A of the Environmental Quality Act 1974 ('the EQA'). It was the appellants' contention that the environmental impact assessment report ('EIA') had to comply with guidelines prescribed by the Director General of Environment ('DGE'), namely a detailed EIA process, which is a procedure undertaken for projects with major impact to the environment and is far more stringent and complex than a preliminary EIA. It was the appellants' argument that the first respondent could not approve any licence under the Atomic Energy Licensing Act 1984 ('the AELA') unless the project complied with terms and conditions of the DGE's approval of the detailed EIA. Since the third respondent only submitted a preliminary EIA, it was the appellants' case that the first respondent had acted ultra vires the EQA and consequently ultra vires the AELA. In response the respondents submitted that the EIA that was submitted by the third respondent was in accordance with what was required at that point in time by the DGE for the approval of the LAMP. The respondents further submitted that it was only after the DGE was satisfied that the third respondent had complied with all the requirements of s 34A of the EQA that the third respondent was granted the TOL for it to carry out the sitting, construction and operation of the LAMP. The trial judge found that the

internal appeal procedure ought to be exhausted before the appellants were allowed judicial review. Consequently the application for judicial review was dismissed. This was the appellants' appeal against that decision. In this appeal the appellants submitted that the trial judge had erred in not following binding precedents, which had decided that where an applicant sought judicial review alleging illegality in the decision of the public authority as was the position in the instant case, there was no need to resort to the internal appeal procedure prescribed in the legislation.

Held, dismissing the appeal with no order as to costs:

(1) Even if there had been non-compliance of the guidelines prescribed under s 34A(2) of the EQA, such non-compliance did not in law nullify the report submitted by the third respondent or the decision of the second respondent as guidelines by the DGE did not have the force of law. Further, although the approval granted in the present case was by the State Director and not the DGE, the approval included conditions which required the third respondent to submit further reports in the future, with some of the reports to be submitted to the DGE himself for his approval. In other words, the granting of the TOL pursuant to the preliminary EIA did not imply that the process was not dynamic and not alive to the need for fresh approvals arising from changes during the implementation stage. Accordingly, since the submission of the preliminary EIA was pursuant to the order of DGE and the TOL was granted upon the DGE being satisfied that s 32(2) of the EQA had been complied with, there was no illegality preceding the granting of the TOL (see paras 10–12).

(2) The internal appeal procedure ought to be exhausted before the appellants should be allowed judicial review, in view of the fact that the issues involving the approvals granted to the third respondent were highly technical in nature and concern environmental issues affecting the health of all the citizens in general and the residents living in the vicinity of the LAMP in particular. In these circumstances it was reasonable that the appeal procedure which had been incorporated in the AELA be resorted to, before recourse was had to the ordinary courts of law. In this respect, the Minister considering this appeal would have the benefit of receiving professional advice from a team of experts in the various Ministries, as opposed to a judge who would be primarily concerned with abuse of power by a public authority (see para 14(a)(b)).

(3) In cases of a technical nature such as this, leave for judicial review ought to be granted only in exceptional cases, such as where there was proof of abuse of power or breach of the rules of natural justice. Since there was no evidence of either, the trial judge could not be faulted for exercising the

discretion in requiring the appellants to exhaust the internal appeal procedure before resorting to the ordinary courts of law (see para 16). A

[Bahasa Malaysia summary

Lembaga Perlesenan Tenaga Atom ('responden pertama') telah memberikan Lynas Malaysia Sdn Bhd ('responden ketiga') satu lesen operasi sementara ('TOL') untuk membina loji bahan-bahan maju Lynas ('LBML') di sebuah bandar di Pahang. LBML terletak antara 2km hingga 20km daripada kawasan perumahan perayu-perayu. Adalah tidak dipertikaikan bahawa operasi LBML melibatkan penggunaan bahan-bahan radioaktif dan bahawa ia akan menghasilkan sisa radioaktif. Perayu-perayu telah memohon semakan kehakiman semula untuk keputusan responden pertama meluluskan TOL itu atas alasan-alasan bahawa keputusan responden pertama telah melanggar s 34A Akta Kualiti Alam Sekeliling 1974 ('AKAS'). Perayu-perayu berhujah bahawa laporan penilaian kesan alam sekitar ('LPK') perlu mematuhi garis panduan yang ditetapkan oleh Ketua Pengarah Alam Sekitar ('KPAS'), terutamanya proses LPK, yang merupakan posedur yang dilaksanakan untuk projek-projek yang mempunyai kesan besar terhadap alam sekitar dan adalah lebih ketat dan kompleks daripada LPK yang awal. Perayu-perayu berhujah bahawa responden pertama tidak boleh meluluskan apa-apa lesen di bawah Akta Perlesenan Tenaga Atom 1984 ('APTA') kecuali projek itu telah mematuhi terma dan syarat kelulusan terperinci LPK oleh KPAS. Oleh kerana responden ketiga hanya mengemukakan LPK yang awal itu, adalah kes perayu-perayu bahawa reponden pertama telah bertindak ultra vires AKAS dan berikutan itu ultra vires APTA. Sebagai menjawab responden-responden berhujah bahawa LPK itu yang telah dikemukakan oleh responden ketiga adalah menurut apa yang dikehendaki pada masa itu oleh KPAS untuk kelulusan LBML. Responden-responden selanjutnya berhujah hanya selepas KPAS berpuas hati bahawa responden ketiga telah mematuhi kesemua keperluan s 34A AKAS maka responden ketiga diberikan TOL itu untuk menjalankan peletakan, pembinaan dan operasi LBML. Hakim perbicaraan mendapati bahawa prosedur rayuan dalaman patut digunakan sebelum perayu-perayu dibenarkan dengan semakan kehakiman. Berikutan itu permohonan untuk kehakiman semula telah ditolak. Ini adalah rayuan perayu-perayu terhadap keputusan tersebut. Dalam rayuan ini perayu-perayu berhujah bahawa hakim perbicaraan telah terkhilaf kerana tidak mengikut keputusan duluan yang mengikat, yang telah diputuskan di mana pemohon telah memohon semakan kehakiman dengan mendakwa keputusan pihak berkuasa awam telah menyalahi undang-undang sebagaimana keadaan dalam kes ini, tiada keperluan untuk menggunakan prosedur rayuan dalaman yang ditetapkan dalam perundangan. B C D E F G H I

Diputuskan, menolak rayuan tanpa perintah untuk kos:

(1) Walaupun terdapat ketidakpatuhan terhadap garis panduan yang ditetapkan di bawah s 34A(2) AKAS, ketidakpatuhan itu dari segi

undang-undang tidak membatalkan laporan yang dikemukakan oleh responden ketiga atau keputusan responden kedua kerana garis panduan oleh KPAS tidak mempunyai kuasa undang-undang. Selanjutnya, meskipun kelulusan diberikan dalam kes ini oleh Pengarah Negeri dan bukan KPAS, kelulusan itu termasuk syarat-syarat yang memerlukan responden ketiga mengemukakan laporan selanjutnya pada masa hadapan, dengan beberapa laporan dikemukakan kepada KPAS sendiri untuk kelulusannya. Dalam erti kata lain, pemberian TOL menurut LPK yang awal itu tidak bermaksud bahawa proses itu tidak dinamik dan tidak peka kepada keperluan untuk kelulusan baru yang timbul daripada perubahan yang berlaku semasa peringkat pelaksanaan. Sewajarnya, oleh kerana LPK terdahulu itu dikemukakan menurut perintah KPS dan TOL telah diberikan setelah KPAS berpuas hati bahawa s 32(2) AKAS telah dipatuhi, tiada kesalahan undang-undang berlaku sebelum TOL diberikan (lihat perenggan 10–12).

(2) Prosedur rayuan dalaman patut digunakan sebelum perayu-perayu dibenarkan kehakiman semula, berdasarkan fakta bahawa isu-isu melibatkan kelulusan yang diberikan kepada responden ketiga adalah bersifat teknikal dan berkaitan isu-isu alam sekitar yang melibatkan kesihatan semua warga secara umum dan penduduk yang menetap dalam kawasan LBML khususnya. Dalam keadaan berikut adalah munasabah untuk prosedur rayuan yang digubal dalam APTA digunakan, sebelum memohon bantuan mahkamah perundangan biasa. Sehubungan itu, Menteri yang mengambil kira rayuan ini akan mendapat manfaat dengan menerima nasihat para profesional daripada pasukan pakar daripada pelbagai Kementerian, bertentangan kepada hakim yang mempertimbangkan terutamanya berkenaan penyalahgunaan kuasa oleh pihak berkuasa awam (lihat perenggan 14(a)(b)).

(3) Dalam kes-kes yang bersifat teknikal seperti ini, kebenaran untuk semakan kehakiman patut diberikan hanya dalam kes-kes tertentu, seperti di mana terdapat bukti penyalahgunaan kuasa atau pelanggaran rukun-rukun keadilan asasi. Oleh kerana tiada bukti berikut, hakim perbicaraan tidak boleh dipersalahkan kerana menjalankan budi bicara menghendaki perayu-perayu menggunakan prosedur rayuan dalaman sebelum memohon kepada mahkamah perundangan biasa (lihat perenggan 16).]

Notes

For cases on application for, see 1(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 278–320.

Cases referred to

Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi [2005] 3 MLJ 361; [2005] 1 CLJ 521, HC (refd)

Diana Chee Vun Hsai v Citibank Bhd [2009] 5 MLJ 643, HC (refd)
Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals [1997] 3 MLJ 23; [1997] 4 CLJ 253, CA (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1, FC (refd)
QSR Brands Bhd v Suruhanjaya Sekuriti & Anor [2006] 3 MLJ 164, CA (not folld)
R v Secretary of State for the Home Department; ex p Swati [1986] 1 All ER 717, CA (refd)

Legislation referred to

Atomic Energy Licencing Act 1984 s 32
Environmental Quality Act 1974 ss 32(2), 34A, 34A(2)
Federal Constitution arts 5, 8, 13
Radiation Protection (Licensing) Regulations 1988 reg 23

Appeal from: Judicial Review No R2–25–35–02 of 2012 (High Court, Kuala Lumpur)

Tommy Thomas (Shanmugan and Mahaletchumi Balakrishnan with him) (Kanesalingam & Co) for the appellants.
Nor Hisham (Kamar Peguam Negara) for the first and second respondents.
Cecil Abraham (Sunel Abraham with him) (Jeff Leong Poon & Wong) for the third respondent.

Anantham Kasinather JCA (delivering judgment of the court):

BACKGROUND FACTS

[1] The appellants are all residents near the town Gebeng in Pahang where the Lynas Advanced Materials Plant ('LAMP') is located, which is, between 2km–20km from their respective homes. The Atomic Energy Licensing Board ('board') approved the application by the third respondent ('LYNAS') for temporary operating licence ('TOL') pursuant to reg 23 of the Radiation Protection (Licensing) Regulations 1988. LYNAS has been issued with a Class A license for the construction of the LAMP, which is now 95% completed. According to the first respondent, other classes of TOL have also been approved but not issued for LYNAS as of 30 January 2012.

[2] The appellants are now applying to quash the decision of the first respondent in approving the TOL. The grounds of application by the appellants are that the granting of the TOL by the first respondent is:

(a) in breach of the law, in particular, the Environmental Quality Act 1974 ('EQA');

(b) in breach of the Constitutional guarantee under arts 5, 8 and 13 of the Federal Constitution;

(c) irrational for failing to take into account environmental matters experienced in China; and

(d) Tainted with conflict of interest when the board required LYNAS to contribute financially to the board for its research purposes.

[3] We propose to focus on the first issue since it formed the thrust of the submission of learned counsel for the appellants. On this issue, Mr Tommy Thomas, learned counsel for the appellants submitted that the error that the learned judge fell into was her failure to follow binding precedents which decide that where an applicant seeking judicial review alleges illegality in the decision of a public authority, the applicant need not utilise any internal appeal process or other alternative remedy but is clothed with the necessary locus to nip the illegality in the bud by commencing proceedings in a court of law. The rationale being that once it is acknowledged by the court that the decision is illegal, then no purpose would be served by resorting to the internal appeal procedure prescribed in the legislation.

[4] The submission of illegality was primarily premised on the alleged breach of s 34A of the EQA. Section 34A of the EQA provides that the Environmental Impact Assessment report ('EIA') that is submitted shall conform to 'guidelines prescribed' by the director general of environment ('DOE'). These guidelines set out two types of EIAs: a Preliminary EIA and a Detailed EIA. A Detailed EIA is a procedure undertaken for projects with major/significant impact to the environment and is far more stringent and complex than a Preliminary EIA. The list of prescribed activities requiring a detailed EIA shows that as at 20 June 2011 the DOE requires any 'Prescribed Activity 'using radioactive material(s) and generating radioactive waste(s)' to go through a Detailed EIA process. It is not disputed that the operation of the LAMP involves the use of radioactive materials and that it would generate radioactive waste.

[5] This submission of learned counsel for the appellants was to counter the finding of the learned High Court judge that although illegality, blatant lack of jurisdiction, serious breach of natural justice and matters of public importance generally justify an applicant to bypass the route of alternative remedy and seek relief by way of judicial review, this is not one such case. Her Ladyship's rationale for this conclusion was twofold. First, because the internal appeal procedure contained in s 32 of the Atomic Energy Licencing Act 1984 ('AELA') had already been invoked by another set of applicants. Accordingly, Her Ladyship was of the opinion that the appeal procedure that had already been set motion by these other applicants ought to be completed particularly since the

hearing date of the appeal on 17 April 2012 was only a week away. Secondly, Her Ladyship observed that the internal appeal procedure in this particular case required prior compliance since:

> The wisdom for Parliament to enact this appeal process is not difficult to grasp. Matters that are brought up in challenge relates to issues, which are highly technical in nature. In view of the fact that the issues involved are technical, scientific and concern environmental affecting health and environment of the nation, surely that tribunal is in a better position to hear the complaints and grievances than the court of law. Issues of facts and findings on technical matters would be more appropriately deliberated in such a forum. Hence, this statutory remedy in my view better suits the case and will satisfactorily dispose of the grievances and complaints of the applicants.

Based on the aforesaid grounds, Her Ladyship dismissed the application for judicial review.

[6] Learned counsel for the appellants in disputing Her Ladyship's decision and the grounds for the same, then proceeded to highlight the distinction between a detailed EIA report and a preliminary report. According to counsel, the intensity of review of the prescribed activity in a detailed EIA process is very different from that of a preliminary EIA. In a detailed EIA, the following must be done which is not included in a preliminary EIA:

(a) LYNAS must submit the proposed terms of reference to the DOE, which through its technical committee may approve those terms of reference but subject to the imposition of conditions;

(b) thereafter, a detailed EIA must be prepared by a consultant appointed by LYNAS and approved by the DOE. Ordinarily, a detailed EIA would also require a detailed report setting out the health and safety impact of the project on workers and on members of surrounding communities generally, called a health impact assessment report;

(c) the detailed EIA must then be subjected to a detailed public consultation stage, where a committee must receive all comments made by members of the public and report on them to the DOE; and

(d) finally, the DOE personally is required to approve the detailed EIA (as opposed to the state director of environment who approves a preliminary EIA).

[7] If the detailed EIA is approved, or approved with conditions, or is rejected, the DOE is required to notify the board constituted under the AELA of that decision. The board must comply with the DOE's decision, and cannot approve any licence under the AELA or regulations made thereunder unless the project complied with terms and conditions of the DOE's approval of the detailed EIA. According to the submission of learned counsel for the

appellants, since LYNAS only submitted a preliminary EIA,it failed to comply with s 34A of the EQA. It therefore follows, according to learned counsel, that the board had acted ultra vires the EQA and consequently ultra vires the AELA in granting the temporary approvals.

[8] Learned counsel for the appellants also submitted that on a purposive construction of the above regulations, it cannot be imagined that a person who has already obtained the first part of the class A licence somehow has a vested right to obtain the subsequent parts of the licence particularly since the regulations show the need for distinct licencing at various stages, with information required at each stage being 'in addition' to information required earlier. It was submitted that this must necessarily imply that information previously supplied must be supplied again with updates to ensure the information given is still accurate. Based on these grounds, learned counsel for the appellants submitted that each separate part or stage requires a fresh licence and application. The fact that any licence issued under the AELA was only valid initially for a maximum period of three years subject to renewal, according to counsel, only served to reinforce his submission to this effect.

[9] The reply of learned counsel for the respondent was essentially that matters concerning the alleged breach of the EQA and/or the need for a detailed EIA are only relevant if the appellants overcome the threshold for obtaining leave. Alternatively, learned counsel submitted that, in any event, there was no breach of the Act since s 34A of the said Act provides that the: 'Report shall be in accordance with the guidelines prescribed by the Director General' (of the second respondent), and the EIA that was submitted by LYNAS was in accordance with what was required/demanded at that point in time by the DOE for approval of the LAMP Project. In this respect, learned counsel for LYNAS highlighted the provisions of s 34A(2) of the EQA which reads:

> If the Director General, on examining the report and after making such enquiries as necessary, is of the opinion, that the report satisfies the requirement s of subsection (2) …, he shall approve the report, with or without conditions attached thereto, and shall inform the person intending to carry out the prescribed activity and the relevant approving authorities accordingly.

In this instance, the EIA report submitted by LYNAS to the DOE was a report produced at his request and it was only after he was satisfied that LYNAS had complied with all the requirements of s 34A that LYNAS was provided with the TOL for it to carry out the prescribed activities of siting, construction and operation of the LAMP. It was the contention of learned counsel for LYNAS that s 23 of the Radiation Protection (Licensing) Regulations 1988 ('RPL 1988') must be read such and not in the manner suggested by learned counsel

for the appellants ie in stages distinct unto themselves, where each stage forms a fresh license with its own attendant pre conditions.

[10] The further alternative submission of learned counsel for LYNAS was that even if there had been non compliance of the guidelines prescribed by the second respondent under s 34A(2) of the EQA, such non compliance does not in law nullify the report submitted by the third respondent or the decision of the second respondent as guidelines by the DOE do not necessarily have the force of law. The authority of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* [1997] 3 MLJ 23; [1997] 4 CLJ 253 (CA) was cited to us wherein Mokhtar Sidin JCA in concurring with Gopal Sri Ram JCA decided that:

> [5] The guidelines by the director general, in any case, has no force of law. Non compliance with it, therefore, would not nullify the project or attract an order for declaration

DECISION OF THE COURT

[11] We dismissed the appellants appeal on the conclusion of the appeal on the 10 September 2012. We agreed to provide our reasons at a later date and these are our grounds. First, we agree with learned counsel for LYNAS that the guidelines do not have the force of law following the decision of this court in the case of *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals*. With respect, we are not inclined to disregard the principle of law enunciated in this case based on the two High Court decisions of *Diana Chee Vun Hsai v Citibank Bhd* [2009] 5 MLJ 643 and *Affin Bank Bhd v Datuk Ahmad Zahid bin Hamidi* [2005] 3 MLJ 361; [2005] 1 CLJ 521 as the decision of this court in *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & Ors & Other Appeals* was not brought to the attention of the High Court in either case.

[12] Furthermore, in our judgment, the guidelines having been pronounced by the DOE himself, must necessarily include a discretion on his part in the implementation of the same so long as he observes the broad parameters of the same. In this case, it is pertinent to note that although the approval was by the state director and not the DOE as in the case of a detailed EIA, the approval includes conditions which requires LYNAS to submit further reports in the future and with some of the reports to be submitted to the DOE himself, for his approval. In other words, with due respect to counsel for the appellants, the granting of the TOL pursuant to the preliminary EIA does not imply that the process is not dynamic and not alive to the need for fresh approvals arising from changes during the implementation stage. For instance, the waste water

treatment plant requires the approval of the DOE and not just the state director of environment. Condition 21 reads as follows:

> Pembinaan High Sludge System (HDS) dan Wastewater Treatment Plant (WWTP) bio treatment plant yang dicadangkan sebelum ianya dibina, hendaklah mendapat kebenaran bertulis daripada Ketua Pengarah Kualiti Alam Sekeliling selaras dengan Peraturan 4, Peraturan-Peraturan Kualiti Alam Sekeliling (kumbahan Effluen-Effluen Perindustrian) 1979.PU(A) 12.

[13] Similarly, conditions 29 and 53 envisage the involvement of DOE in one case and the approval in writing of DOE in the other, before the commencement of works by LYNAS:

> Pelan Tindakan Kecemasan (Emergency Response Pelan) bagi 'on-site' dan 'off-site' yang mengambil kira semua kemudahan loji yang berhampiran dan pengurusan lalulintas dalam menghadapi sebarang kemalangan, pencemaran, keadaan kecemasan atau kejadian di luarjangkaan hendaklah disediakan tiga (3) bulan sebelum premis mula beroperasi. Rundingan hendaklah dibuat terlebih dahulu dengan pihak-pihak seperti Lembaga Pelesenan Tenaga Atom, Jabatan Bomba dan Penyelamat Malaysia, Polis Diraja Malaysia, Jabatan Keselamatan dan Kesihatan Pekerjaan dan Pihak Berkuasa Tempatan dan jiran-jiran berhampiran sebelum pelan berkenaan disediakan. Pelan tersebut hendaklah dikemukakan kepada Jabatan Alam Sekitar Negeri Pahang dan salinannya kepada Ibu Pejabat Jabatan Alam Sekitar, Putrajaya serta diuji dan dikemas kini dari semasa ke semasa mengikut keperluan. (condition 29)

> Sebarang pemasangan alat pembakaran bahanapi seperti dandang, jana kuasa, 'flare stack', alat kawalan pencemaran udara dan cerobong serta kemudahan berkaitan perlu dikemukakan kepada Jabatan Alam Sekitar Negeri Pahang untuk kelulusan Bertulis (KB) daripada Ketua Pengarah Kualiti Alam Sekeliling sebelum kerja-kerja pemasangan / pembinaan dimulakan seperti mana tertakluk di bawah Peraturan 36 & Peraturan 38, Peraturan Kualiti Alam Sekeliling (Udara Bersih), 1978. (condition 53)

Accordingly, since the submission of the preliminary EIA was pursuant to the order of DOE himself and the TOL was granted upon the DOE being satisfied that s 32(2) of the EIA had been complied with, we are unable to detect any illegality preceding the granting of the TOL.

[14] In our judgment, the internal appeal procedure ought to be exhausted before the appellants should be allowed judicial review not, with respect, for the reasons advanced by the learned judge of the High Court ie that the application of five others is pending before the Minister, but for the following reason:

(a) the whole exercise before and after the commencement of works by LYNAS is extremely complex and subject to LYNAS complying with the numerous conditions before, during and after the commencement of

operations. For instance, the approval letter of 15 February 2008 issued by the State Director of Environment of the State of Pahang on behalf of the DOE incorporates 78 conditions with the last condition being:

> Mematuhi apa-apa arahan bertulis Ketua Pengarah Kualiti Alam Sekeliling dari semasa ke semasa

In our opinion, the submission of learned counsel for the appellants that there are distinct stages in the approval process under the RPL regulations and that each of the stages are distinct is unacceptable since this submission carried to its logical conclusion implies that each and every person living in the vicinity of the LYNAS plant is entitled to pursue judicial review at every stage of alleged non compliance by LYNAS with any interim certification, with the ensuing multiplicity of review applications. In our judgment, the more practical interpretation of the AELA and the regulations, is, for there to be only one judicial review and for this review to be available only after the applicant has exhausted the internal appeal procedure; and

(b) secondly, and in this we agree with the learned judge of the High Court, that the issues involving the approvals granted to LYNAS are highly technical in nature and concern environmental issues affecting the health of all the citizens in general and the residents living in the vicinity of the LAMP in particular. In these circumstances, in our opinion, it is only reasonable that the appeal procedure which parliament in its wisdom has deemed appropriate to incorporate in the AELA be resorted to, before recourse is had to the ordinary courts of law. In this respect, it must be borne in mind that the Minister when considering the appeal has the benefit of receiving profesional advice from a team of experts in the various Ministries, unlike a judge in judicial proceedings who is primarily concerned with abuse of power by a public authority.

[15] In conclusion, we are compelled to address two issues raised by learned counsel for the appellants. The first is learned counsel's submission that there is a distinction to be drawn between the leave stage and the substantive stage in determining the impact of an alternative remedy on an application for judicial review. At this preliminary stage, according to counsel, all that is required to be showed is that the claim is frivolous. The case of *QSR Brands Bhd v Suruhanjaya Sekuriti & Anor* [2006] 3 MLJ 164 was cited in support of this proposition. With respect, we are unable to agree with this submission as the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 acknowledged that 'there is no hard and fast rule' concerning the stage at which the question of alternative remedy should be dealt with after citing the case of *R v Secretary of State for the Home Department; ex p Swati* [1986] 1 All ER 717 as authority for this proposition.

[16] Secondly, admittedly the Federal Court in the same case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* after stating that the reality of the matter is that:

> When genuine grounds for judicial review are alleged, it is the refusal rather than the grant of relief which is the exceptional course (Quoting Professor Wade — see p 38 — para G to H of the reported judgment of the court).

then acknowledged cases of a technical nature involving planning, employment and tax to fall within the category of cases where the court could justifiably refuse, where a statute provides for a specialised appeal procedure. In other words, in cases of a technical nature such as this, the rule would operate in reverse and the court should grant leave for judicial review only in exceptional cases. The exception being where the applicant is able to demonstrate abuse of power or breach of the rules of natural justice. Since we are not persuaded of the existence of any abuse of power or breach of the rules of natural justice in this case, with respect, in our judgment, the learned trial judge cannot be faulted for exercising the discretion vested in the court in requiring the appellants to exhaust the internal appeal procedure before resorting to the ordinary courts of law.

[17] Accordingly, the appeal was dismissed with no order as to costs. The deposit to be refunded to the appellants.

Appeal dismissed with no order as to costs.

Reported by Kohila Nesan